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SUBJECT: FRANCE'S COPYRIGHT BILL PENALIZES ILLEGAL
DOWNLOADS; INTRODUCES INTEROPERABILITY OF DIGITAL CONTENT

REF: PARIS 8626

NOT FOR INTERNET DISTRIBUTION

¶1. (SBU) SUMMARY. A final text for France's new digital copyright law was voted by France's National Assembly on March 21, following months of fierce debate over how best to balance consumer rights against copyright in the Internet age. The complex draft bill, designed to bring France into line with a 2001 EU directive, outlaws the downloading and copying of commercial DVDs and CDs, provides an exception for very limited private use, and establishes fines and prison sentences as punishment for offenders. The bill, approved 296 to 193, further provides for the establishment of a "college of mediators" to decide on copyright exceptions. Finally, the new law insists on the "interoperability" of the Apple iTunes Music Store with other music portals such as Sony, Virgin and FNAC, thus bypassing digital rights management (DRM). What was originally seen as an opportunity to adapt France's Intellectual Property Code to the digital environment and combating piracy and counterfeiting has become a highly complex, technical text, incomprehensible even to the most specialized lawyers. The debate is therefore far from over as the draft bill moves to the Senate in May, where parliamentary staff is far more knowledgeable on high-tech and intellectual property issues than the National Assembly. End Summary.

The new bill: an embarrassment for the Government

¶2. (SBU) The Law on authors' rights and related rights in the information society (called DADVSI for short in French) is the French Government's third attempt to transpose the 2001 EU Copyright Directive. Begun in 2001, the debate on the draft bill was characterized by mixed messages and confused strategies. Before being voted by the National Assembly on March 21, the government had successively proposed watering down fines and prison sentences for illegal downloading, withdrawn a proposal to legalize the copying of a movie and music files from the Internet via a flat tax (which legislators had seen as popular with youth voters), and shrouded in confusion a proposal to make music files playable on any system.

Penalties for illegal downloads

¶3. (SBU) In its current form, the DADVSI allows for a jail term of up to six months and a fine of 30,000 euros (USD 37,000) for those who supply software enabling users to break copyright protection on DVDs and CDs, making them available on the Internet. Furthermore, people possessing or using this software to remove copyright protection will face a fine of 750 euros, while hackers caught working individually to break the copyright on discs will face a fine of 3,750 euros. The first-time offender downloading tunes or a film will be fined 38 euros. U.S. industry had lobbied discretely to ensure that "habitual" copiers were the target of enforcement.

Copyright Exceptions

¶4. (SBU) One of the key debates in the draft bill was the nature of the private copy: was there to be legislation that legalized a private copy or was the "exception" to the law to be maintained? The current draft bill has not legitimized the private copy, a concept that was upheld recently in a court case over illegal copying of a DVD of David Lynch's 2001 film Mulholland Drive. U.S. industry had appealed the earlier result. France's top appeal court, the Cour de Cassation, ruled in February 2006 that there was no inherent consumer right to make copies, and that the private copy would remain as an exception. Previously, the government had offered (on shaky legal grounds) language

that would have allowed five private copies per person. That language was struck following the Mulholland Drive ruling.

15. (U) The draft bill instead will maintain the exception for private use. Instead, the decision will be left to a "college of mediators", on a case-by-case basis. This "college" will also decide on copyright exceptions for libraries, journalists and handicapped people. This new independent authority will include two magistrates, who will choose a third mediator, and will be responsible for checking the validity of each of the protection measures used.

Attempting to impose a "universal" format

16. (SBU) The new bill attempts to create a universal standard among commercial standards such as Sony Stage, Windows Media Player and Apple iTunes. These formats, unlike compression formats such as MP3, are proprietary formats whose use is subject to a license or to the use of software belonging to those companies, the most obvious example being the format developed by Apple and intended for the Apple iPod player. To address this problem and impose a universal system, the National Assembly bill is elusively calling for "interoperability" between these formats, "in the respect of copyright law." It makes no reference to licenses but calls for all license holders (for any format) to make available to all technical measures necessary for "an open standard." While this provision applies to all online music stores, Apple would undoubtedly be the most affected given its phenomenal market penetration in France, like elsewhere.

Next Stop: The Senate

17. (SBU) While industry observers originally thought France's upper house would rubberstamp the National Assembly's bill, the Senate is now likely to play a key role in the shaping of the DADVSI. While some French National Assembly members have often been caught unaware of the international consequences of their actions, whether debating on the WTO negotiations or on high-tech issues, the Senate has proven a more acute and better-informed observer. The debate resumes in the Senate in May.

Comment: Electioneering and Lack of Expertise

18. (SBU) A French lawyer from Latham and Watkins told us on March 20 that he had the most difficult time digesting a draft law which combined electioneering with consumer rights, leaving aside all the important issues regarding intellectual property and licenses. In his view, he said that the government had no business insisting a company share its proprietary format and accused the government as well as consumers' groups of pandering to youth voters/consumers at the expense of clarity. We surmise that while consumer lobbies had a high impact on the posture that French National Assembly members presented to their constituents, corporate lobbies are likely to have more of a say in the French Senate in May. Ironically, France intended to break new ground by introducing a "universal" standard to be copied by all. Instead, it merely succeeded in combining a series of disjointed provisions -- changed time and time again -- giving the final product very little credibility. End Comment.

Stapleton